

From: Anna Amatangelo <aamatangelo@anmf.org.au>
Sent: Thursday, 13 June 2019 5:09 PM
To: AMOD <AMOD@fwc.gov.au>
Cc: Chambers - Hatcher VP <Chambers.Hatcher.VP@fwc.gov.au>
Subject: 4 yearly review of modern awards (AM2019/1) and 4 yearly review of modern awards - Nurses Award 2010 (AM2014/207).

Dear Associate

Please find attached submission by the Australian Nursing and Midwifery Federation in relation to the 4 yearly review of modern awards (AM2019/1) and 4 yearly review of modern awards - *Nurses Award 2010* (AM2014/207).

Kind Regards
Anna

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13 June 2019

The Honourable Justice Ross AO
President Fair Work Commission
11 Exhibition Street
Melbourne VIC 3000

By email: amod@fwc.gov.au

Dear Justice Ross

**Re: 4 yearly review of modern awards (AM2019/1) and
4 yearly review of modern awards– Nurses Award 2010 (AM2014/207)**

The ANMF seeks to make a further submission in relation to *Exposure Draft-Nurses Award 20XX* in light of the recent Full Bench decision *Australian Nursing and Midwifery Federation v Domain Aged Care (Qld) Pty Ltd t/a Opal Aged Care (ANMF v Opal Aged Care)*.¹

As a result of the findings in the *ANMF v Opal Aged Care* decision, the ANMF wishes to put an altered position to that it has previously put in relation to the payment of casual employees for work performed on Saturdays and Sundays.

July 2016 submission (AM2014/207)

In a submission dated 21 July 2016 the ANMF submitted that it would agree to amend clause 6.4(d) in the Nurses Award Exposure Draft and that the following underlined wording be inserted at clause 6.4(d):

- (d) A casual employee will be paid shift allowances and Saturday and Sunday rates calculated on the minimum rate of pay applicable to their classification and pay point, excluding the casual loading with the casual loading component then added to the penalty rate of pay.²

Clause 6.4(d) is contained in the current Award at clause 10.4(d). This clause was suggested after a similar suggestion by Aged Care Employers in their submission dated 28 January 2015³. This wording was subsequently adopted by the FWC in the exposure draft published on 2 November 2016.⁴

¹ *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2019] FWCFB 1716 (Gostencnik DP, Colman DP, McKenna C, 17 April 2019)

² ANMF, [Further submissions](#) (21 July 2016)

³ Aged Care Employers, [Submission](#) (28 January 2015)

⁴ FWC, [Exposure draft - Nurses Award 2015 - further revised](#) (2 November 2016)

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ANMF Journals

Australian Nursing and
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Australian Journal of
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The ANMF did not oppose the proposed amendments to the Exposure Draft to include a reference to working on weekends in clause 6.4(d) on the basis that it reflected the interpretation of a decision of Watson VP in 2012, who relevantly stated:

[35] In my view, in the case of more than one loading applying, these provisions do not require the penalty to be calculated as a percentage of the loaded rate. Rather they require a calculation of each penalty on the base rate and the addition of the derived amounts onto the base rate. This reflects the normal notion that multiple penalties are often required to be applied, but that penalties are not applied on penalties.

...

[37] ... The (casual) loading is not however applied to the loaded weekend rate. In my view the same method of calculation applies to weekends as in the case of shift allowances. Each penalty is calculated on the base rate. The resultant amounts are added together.⁵

ANMF v Opal Aged Care

The ANMF respectfully submits that the approach adopted by VP Watson as set out above is not the correct interpretation of the Award. The *ANMF v Opal Aged Care* decision is the authority on this matter. In *ANMF v Opal Aged Care* the Full Bench stated:

[17] Clause 10.4(b) of the Award (*Nurses Award 2010*) says that a casual employee will be paid an hourly rate equal to 1/38th of the weekly wage plus a casual loading of 25%. On a plain reading of the clause, the hourly rate includes the loading; the loaded casual rate is the 'ordinary rate of pay'. **When a casual employee works ordinary hours on a Saturday or Sunday, clause 26 of the Award requires the weekend loading to be applied to the ordinary rate of pay. For casual employees, this rate is the casual rate.** The same is the case with the public holiday penalty in clause 32.1.

[18] Furthermore, clause 10.4(d) makes very clear that casual employees are paid shift allowances on the ordinary rate of pay 'excluding the casual loading', with the casual loading then added to the penalty rate of pay. No such exclusion is made in respect of other penalties. ... It is already clear that the ordinary rate for casuals is the loaded rate. Clause 10.4(d) specifies a different arrangement in respect of shift allowances, because otherwise they would have been subject to the general position that penalties are applied to the loaded casual rate, and this was not intended to be the case of shift allowances. It is also significant that clause 10.4(d) speaks of 'the ordinary rate of pay excluding the casual loading', which also reaffirms that in the context of this clause, for casual employees, the casual loading is part of the ordinary rate; otherwise it would not make sense to speak of 'excluding' the casual loading from it. (Emphasis added)

Clauses 10.4(b) and 10.4(d) of the Award are the equivalent clauses to 6.4(b) and 6.4(d) respectively, in the Nurses Award Exposure Draft. It is clear that casual loading and weekend penalties "compound" in the Award as the ordinary rate of pay of pay for a casual employee includes the casual loading.

With respect to shift allowances, these are not compounded but added. This is because Clause 10.4(d) makes an exception for afternoon and night shift penalties which are calculated on the ordinary rate of pay which specifically excludes the casual loading.

⁵ *Aged Care Association Australia Ltd & Others, Australian Nursing Federation, Australian Business Industrial [2012] FWA 9420* (Watson VP, 14 November 2012)



Common issues: Overtime for casuals (AM2017/51)

The ANMF draws the Commission's attention to its submission in this matter.⁶ In particular, the ANMF reiterates our point made in that submission at paragraph 21:

21. The ANMF respectfully submits that the Full Bench constituted in this matter should have regard to the Full Bench decision in *ANMF v Opal Aged Care* as referred to above with respect to the approach taken under the award for overtime for casuals. In particular, the Full Bench in *ANMF v Opal Aged Care* provides authority for the following:
- The loaded casual rate is the ordinary rate of pay for casuals;
 - The award provides for casuals to receive payment for overtime on the loaded casual rate;
 - Save for shift allowances as referred to in 10.4(d) which makes specific provision for calculating how casuals will be paid (the addition method) penalties for casual employees are otherwise calculated on the loaded casual rate (the compounding method) ;
 - The award is clear with respect to the application and calculation of allowances and penalties, including overtime penalties for casuals.

Proposed wording

On the basis of the above the ANMF wishes to withdraw its submission dated 21 July 2016 as it was founded on an incorrect interpretation of the Award, which has since been clarified by the Full Bench of the Commission in *ANMF v Opal Aged Care*.

For consistency of language within the clause, the ANMF proposes that the following wording be used in substitute at 6.4(d) in the Exposure Draft of the Nurses Award, with underlined words as additions and strikethroughs for removal:

- (d) A casual employee will be paid shift ~~allowances~~ penalties ~~and Saturday and Sunday rates~~ calculated on the minimum rate of pay applicable to their classification and pay point, excluding the casual loading with the casual loading component then added to the penalty rate of pay.

If the above amendment is adopted the wages contained in Schedule B would also need to be amended to reflect the interpretation of the Award as stated in *ANMF v Opal Aged Care*.

The ANMF seeks the Commission's assistance in determining the best approach to deal with the implications of the *ANMF v Opal Aged Care* on the Exposure Draft of the *Nurses Award*. The ANMF respectfully requests this matter AM2014/207 be listed for mention at the Commission's earliest convenience.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Kristen Wischer'.

Kristen Wischer
Senior Federal Industrial Officer

Cc Associate to Vice President Hatcher
Chambers - Hatcher VP Chambers.Hatcher.VP@fwc.gov.au

⁶ ANMF, [Submission in reply - Nurses Award](#), AM2017/51 (3 May 2019)

